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Supreme Court, U.S.
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No. 92-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DESARROLLOS METROPOLITANOS, INC.,
Petitioner,

v.

TABER PARTNERS I, A NEW YORK GENERAL PARTNERSHIP, MERIT BUILDERS, INC., MERIT BUILDERS, S.E., and VICTOR TORRES & ASSOCIATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF IN OPPOSITION

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Question Presented

The petitioner has adroitly avoided the true issue in this case by presenting the "Question Presented" in the manner it does at page (i) of its Petition. The real issue here is whether a partnership acquires the citizenship of its principal place of business, in addition to the citizenship of each of its partners. Respondent contends that that issue has been decided in the negative by this Court in *Chapman v. Barney*, 129 U.S. 677 (1889); *Great Southern Fire Proof Hotel Company v. Jones*, 177 U.S. 449 (1900); *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965); *Carden v. Arkoma Associates*, 494 U.S. 185 (1990).

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BRIEF IN OPPOSITION

Statement of the Facts

The facts, for purposes of this application for a *writ of certiorari* are those found by the Court of Appeals. What is more, as the Court of Appeals for the First Circuit found, these facts were uncontroverted. From page 13a of the petition and from *Taber Partners, I v Merit Builders, Inc.*, 987 F.2d 57, 63 (1st Cir. 1993), we quote:

"Here, the uncontroverted facts reveal that the sole corporate 'activities' of Lerfer and Calumet consist of holding or administering their assets in Taber, and that all such administering occurs exclusively in New York. Moreover, there is no evidence that Lerfer and Calumet engage in the operation and/or management of the Hotel. Indeed, it is uncontroverted that Taber was expressly created by Lerfer and Calumet, as stated in the Agreement, 'to acquire, own, operate and manage [the Hotel in Puerto Rico]." *See also* 798 F. Supp. at 905, 906 (characterizing as undisputed the fact that 'Taber's business is the operation and management of the [Hotel]'). It is also apparent from the Agreement that Lerfer and Calumet delegated the day—to—day management of Taber to Taber's officers, Eugene and Linda Romano. Appellees have introduced no evidence to suggest that either Lerfer or Calumet ever usurped that role.[6]

In sum, the record reveals that Lerfer and Calumet serve as holding companies which manage their assets in Taber, a separate and legally distinct, partnership entity, and that all their 'activities' as holding companies occur exclusively in New York. We need go no further. Under either the 'nerve center' test or the 'center of corporate activity' test,[7] the principal place of business of both Lerfer and Calumet is New York.[8] *Cf. Vareka Invs., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907, 910 (11th Cir.) (holding that an Ecuador

corporation which served as a 'passive investment vehicle' for Florida real estate venture had principal place of business in Ecuador, where it maintained its corporate books and records, made all corporate decisions, held all corporate meetings, hired its employees, and obtained loans for the initial purchase of the venture), *cert. denied* 469 U.S. 826, 105 S. Ct. 107, 83 L.Ed.2d 51 (1984).[9] Both Lerfer and Calumet are therefore citizens of New York. And because a partnership is a citizen of those states in which its partners are citizens, *see supra* p.58, it follows that Taber is also a citizen of New York, and that the district court's contrary determination was clearly erroneous.

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[6] We are aware that the district court found that Lerfer's and Calumet's 'primary activity . . . is the renovation and operation of the [Hotel] which is located in Puerto Rico.' *See Taber Partners I*, 798 F. Supp. at 912. However, we have not found any evidence to support such a finding. Indeed, the district court itself found that '[Lerfer and Calumet] devote almost all of their corporate activity to administer their assets in the partnership,' *id.*, activity which occurs almost exclusively in New York. It further found that 'Taber's business is the operation and management of the [Hotel].' *Id.* at 906. Given that the district court made no attempt to reconcile these findings, we are not inclined to accord them any deference.

[Footnotes 7 and 9 do not refer to factual matters, but only to questions of law covered elsewhere in this opposition. Footnote 8 discloses that there is no need to determine which test to apply, inasmuch as Lerf-

er's and Calumet's principal business is New York under either one.]

Argument

Even though the petitioner's "Question Presented" is a thinly disguised camouflage of the issue in the case, there is no reason to grant the *writ* on the grounds suggested by the petitioner.

1. There is no conflict among the Circuits in determining the principal place of doing business of a corporation. Specifically, there is no conflict between the decisions of the Fifth Circuit Court of Appeals and the First Circuit Court of Appeals.

2. The Court of Appeals for the First Circuit followed this Court's holding in *Carden, supra.* The Partnership Law of New York has no relevance to the determination of citizenship of the partners for diversity of citizenship purpose.

3. In such a fact-determinative realm as principal place of business, the lower courts do not,and should not, adopt hard and fast rules to determine principal place of doing business. Actually, the rule advocated by the petitioner is that all forms of organization should be ignored and the trial court should concentrate only on those facts that would defeat diversity jurisdiction. That doesn't even sound like a rule of law. These points will be taken *in seriatim.*

Point I

No matter how it be camouflaged, the petition seeks a result based on identifying a partnership with its own citizenship rather than the citizenship of the individual partners. Reduced to its essentials the ar-

gument is: that instead of live individuals, the partners in Taber I are corporations; a corporation, unlike a human, has at least two citizenships for purposes of diversity of citizenship, its place of incorporation and its place of principal business; but, if in analyzing the corporation's activity and after applying the tests of "nerve center," "center of corporate activity," and the "locus of operations of the corporation," diversity jurisdiction is not defeated, then the Court should treat the partnership as if it were a corporation, and add its place of principal business to defeat diversity jurisdiction. Recognizing that this Court found the invitation to look at the reality of partnership's business "less than compelling" in *Carden, supra,* the petition weaves an elaborate webb of "conflict" between the decisions of other Courts of Appeals and the decisions of the Court of Appeals in the First Circuit on how to determine a corporation's principal place of business.

The conflict does not exist. The First Circuit held:

> (1) that in determining a corporation's principal place of business, a district court's inquiry must focus *solely* on the business activities of the corporation whose principal place of business is at issue; and (2) that an *exception* to this general rule applies where there is evidence that the separate corporate identities of a parent and subsidiary have been ignored." Petitioner's Appendix at 12a; *Taber Partners, supra,* 987 F.2d at 63. (*emphasis in the original and supplied*)

This is the same rule applied by all of the circuits, including the Fifth Circuit:

> "As a general rule, in a suit involving a subsidiary corporation, the court looks to the state of incorporation and principal place of business of the subsidiary, and not its parent. There is an exception, however, if the subsidiary is merely the alter ego of the parent entity, having no independent existence . . . In practice, the decisions have 'repeatedly upheld the independence of the subsidiary corporation while giving lip service to the alter ego doctrine.' Part of the reason for this is the standard used; courts generally will not apply the alter ego doctrine if the subsidiary is a separate entity, regardless of domination by the parent.[1]" J. Moore, J. Lucas, H. Fink, R. Freer, D. Weckstein & J. Wicker, *Moore's Federal Practice*, § 0.77 [2.-5], at 800.101 (2d ed. 1993) (*citations omitted*)

In support of this proposition, virtually verbatim of the First Circuit, the commentator cites the same Fifth Circuit cases relied on by petitioner below, including *J.A. Olson Co. v. City of Winona*, 818 F.2d 401 (5th Cir. 1987), *Panalpina Welttransport GMBH & SGS Controll Co. v. Geosource, Inc.* , 764 F.2d 352 (1985), and *Freeman v. Northwest Acceptance Corporation*, 754 F.2d 553 (5th Cir. 1985), as well as a First Circuit case relied on by the First Circuit in its decision below, *Topp v. CompAir, Inc.*, 814 F.2d 830, 834 (1st Cir. 1987).

Petitioner's reliance on the above cases is inexplicable. In *J.A. Olson*, *supra* at 414, the Fifth Circuit expressly refused to apply the alter ego doctrine:

> "Olson has chosen to be incorporated separately from its parent and has no doubt re-

> ceived benefits from that separate incorporation. Now, however, because its incorporation as a separate and independent entity is inconvenient, Olson wants us to ignore its separate identity and allow it to pick the jurisdiction for this lawsuit. Such an argument is contrary to the intent of Congress."

And in *Panalpina, supra*, the issue was solely that of imputing the parent's place of incorporation, not its principal place of business, to the subsidiary. 764 F.2d at 354.

Petitioner builds its straw man on three cases of the Court of Appeals of the Fifth Circuit, each of which is inapposite, because they fall within the exception. In *Freeman, supra*, the appellate court raised the issue of diversity after both parties had appealed from a judgment entered on a jury verdict. The Court of Appeals believed that despite the allegations in the complaint, plaintiff individuals were citizens of Colorado, not Texas; and that Northwest was the parent and alter-ego of First Commercial Credit Corporation, the separate corporate identity of which were violated, and it was First Commercial, the Colorado Corporation, that committed the conversion. A totally separate reason for remand was present according to the Court of Appeals. The Colorado corporation was an indispensable party under Rule 19 Fed. R. Civ. P. Thus, *Freeman, supra* can hardly stand for any broad proposition of law, especially when it sent the entire case back to the district court to determine the facts.

In *Toms v. Country Quality Meats, Inc.*, 610 F.2d 313 (5th Cir. 1980), the Court of Appeals reversed a

dismissal for lack of diversity. Defendant was a Delaware corporation which claimed its principal place of doing business was Georgia and that, therefore, plaintiffs' Georgia citizens could not sue it in the federal court. Plaintiffs, in turn, contended that Country Quality's principal place of doing business was Texas. The evidence revealed that the Texas parent prepared Country Quality's income tax forms; accounting was performed in Texas; payroll for the Georgia employees were made in executive offices in Texas; insurance was purchased in Texas; operating control and all major decisions were made in Texas; and managerial personnel were supplied and approved in Texas. Relying on the *Village Fair*, *infra* decision, the Court of Appeals applied the "total activity" test, which, like the First Circuit test, embraces all the approaches for determining principal place of business. Taking everything into consideration, it was the parent management company that ran the subsidiary's business on a day-to-day basis. Jurisdiction was upheld, not defeated.

The third leg is a pair of cases involving some of the same parties that are unique. The diversity claim was dismissable on its face because plaintiff, an alien corporation, sued a defendant, another alien. The Court did find that the parent was liable for its subsidiary's breach, even if the subsidiary had not been served, but resurrected the case by finding independent federal jurisdiction of the defendant's counterclaim. That finding enabled the plaintiff to come back into the case as a counter-claimant. *Kuehne & Nagel (Ag & Co. v. Geosource, Inc.*, 874 F.2d 283 (5th Cir. 1989). In the earlier companion case cited by

petitioner, the case was dismissed on an entirely different ground, *viz* alien v. alien. *Panalpina, supra.*

Petitioner glibly concludes that "the district court's finding of Puerto Rico as the principal place of business of Lerfer and Calumet would have been upheld in the Fifth Circuit . . . [because] the activities of Taber clearly would be deemed the activities of Taber's two corporate partners. Petitioner's Brief at 12-13. This assertion is without basis in law, or fact. Indeed, respondent Merit relied heavily on the Fifth Circuit case law in its successful argument below. In a factually analogous case, *Village Fair Shopping Center v. Sam Broadhead Trust*, 588 F.2d 431 (5th Cir. 1979), the Fifth Circuit reversed the district court's finding of lack of diversity. The plaintiff was a partnership which owned and operated a shopping center. One of the partners, whose citizenship was in question, was a corporation engaged in passive investment activity with its office in New York. The Court, would not impute the partnership's activity of operating the shopping center to the corporate partner, and determined that the corporate partner's principal place of business was in New York, where all executive and policy decisions were made, and the management of its assets occurred. *Id.* at 434. *See, also, J.A. Olson, supra* at 410, 412.

The Fifth Circuit in *Village Fair, supra*, applied the "total activities" test, which is the union of the "nerve center" test and the "place of activity" test. 588 F.2d at 434. The First Circuit in the instant case held that under either of the latter two tests, the principal place of business of both Lerfer and Calumet is New York. Petitioner's Appendix at 13a-14a. As will be shown in Point III, *infra*, all the circuits apply

essentially the same tests, albeit labelled differently. The First Circuit, applying the highest standard of review,[1] determined that the district court's findings were clearly erroneous. Petitioner's Appendix at 13a and n.6. The Court stated that,

> ". . ., there is no evidence that Lerfer and Calumet engage in the operation and/or management of the Hotel." Petitioner's Appendix, 13a; 987 F.2d at 63.

It is this *factual* determination with which petitioner has a quarrel, not the law of the First or the Fifth Circuits.

Point II

In its second argument, petitioner is asking this Court to repudiate *Carden, supra* and to distinguish a partnership from its partners, and to give the partnership a separate citizenship based on its principal place of business. The fact that Section 1332 of Title 28 U.S.C. makes no such provision does not trouble petitioner. Neither does the absence of any authority. This Court faced much the same argument of "business reality" and that forms are only "technical." It responded:

> "The resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization. But, as must be evident from our earlier discussion, that has

[1] A district court's determination of citizenship for purposes of diversity jurisdiction is a mixed question of law and fact. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 11 (1st Cir. 1991).

been the character of our jurisprudence in this field after *Letson* [*Louisville C & C.R. Co. v. Letson*, 2 How. 497, 11 L.Ed. 353 (1844)] K. See, Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1,35 (1968). Arkoma is undoubtedly correct that limited partnerships are functionally similar to 'other types of organizations that have access to the federal courts,' and is perhaps correct that '[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment.' Brief for Respondent 33. . . . [I]n other words, having entered the field of diversity policy with regard to artificial entities once(and forcefully) in *Letson*, we have left further adjustments to be made by Congress.

Congress has not been idle. . . . [N]o provision was made for the treatment of artificial entities other than corporations, although the existence of many new post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the sort of Massachusetts business trust at issue in *Navarro* [*Navarro Savings Ass'n v. Lee*, 946, U.S. 458 (1980)], must have been obvious.

. . . .

[W]e have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision." *Carden, supra*, 494 U.S. at ___, 110 S. Ct. at 1021-22.

Ignoring the above holding, petitioner would have this Court rewrite the diversity statute to include a section that would require a partnership which is a party to acquire the citizenship of each of its partners and the principal place of the partnership's principal place of business, if the law of the state creating the partnership identifies the activities of the partnership as those of the partners, as New York law allegedly does.

As the First Circuit so succinctly responded,

> "Whether or not appellees are correct in their characterization of New York partnership law, a proposition on which we express no opinion, such law is not controlling in light of *federal* law which distinguishes between a partnership and its partners for purposes of diversity jurisdiction." (Citing *Carden, supra.*) Petitioner's Appendix at 12a-13a, n.5; *Taber Partners I, supra*, 987 F.2d at 63, n.5.

Point III

In 1958 Congress amended the diversity statute, 28 U.S.C. § 1332 to grant all corporations at least two citizenships. As early as 1963, the three distinct tests used by the Court of Appeals had been enunciated. *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D. N.Y. 1959) (nerve center); *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3rd Cir. 1960) (locus of operations of the corporation; and, *Inland Rubber Corporation v. Triple A Tire Service, Inc.*, 220 F. Supp. 490 (S.D. N.Y. 1963) (actual physical operations). As the Court of Appeals held in *Topp, supra*, all three tests tend often to merge and overlap.

All Circuits apply the same tests whether designated in the same words or others.[2]

As a leading commentator so aptly explained

> "We must make two points concerning the tests enumerated by the courts for determining a corporation's principal place of business. *First, the tests never have been hermetically sealed into separate sets of criteria. They have always overlapped. Second, the tests do not compete for hegemony. There is no right or wrong test in the abstract. Corporations are organized in a myriad of different ways, and it is naive to think that one prescription will handle all cases.*
>
> Instead, the 'tests' identify a series of factors. The court's job, rather than to grab hold unthinkingly of this or that 'test,' is to identify those factors that are are[sic] relevant in a particular case. In reality,then, various tests are 'articulations of substantially the same concept no matter what label the court use[s] in a particular instance.' They complement one another and are readily reconciled as proposing factors which are relevant in different cases. *Moore's Federal Practice*, § 0.77 [3—4], at 800.114—115. (*emphasis supplied and citations omitted*)

The petitioner's quest for a uniform rule demonstrates its misunderstanding of the nature of a court's

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[2] The Seventh Circuit calls its test "the nerve center," but as analyzed in *J.A. Olson*, *supra* in the text, when applied by the Court, it is only another term for principal place of business as determined by examining all the facts.

fact-specific determination of a corporation's principal place of business.

The Fifth Circuit's "total activities" test is no different than the approach used by the First Circuit, or any other circuit. The Fifth Circuit " . . . mirrors what the other courts basically do, even though they might not call their approach a 'total activities' test." *Id.* at 800.115.

Conclusion

The *Writ of Certiorari* should not issue. There is no conflict among the Circuits. There is no need to apply state partnership law. The Court of Appeals for the Fifth Circuit, or any other Circuit Court, would have applied the same test and reached the same conclusion, as the Court of Appeals for the First Circuit did in this case.

Respectfully Submitted

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